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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JIMMIE LEONNE MALLETTE, Defendant and Appellant.	A152263 (Napa County Super. Ct. No. CR179161)

Appellant was found guilty of several sexual offenses committed against a child, as well as of the offense of continuous sexual abuse of a child. Because a defendant cannot be convicted of both continuous child abuse and the specific sexual offenses upon which the continuous child abuse charge is based, the trial court vacated the count of continuous child abuse. Appellant contends the court was required instead to vacate the individual counts and leave him convicted of only continuous child abuse. He additionally contends that the court abused its discretion in permitting the prosecutor to introduce evidence of prior sexual misconduct, and that there is insufficient evidence to support the conviction on one of the individual counts. We affirm.

BACKGROUND

The amended information charged appellant with three counts of oral copulation with a child under age 10 (§ 288.7, subd. (b))[1] (counts 1, 2 and 3); two counts of lewd conduct with a child under age 14 (§ 288, subd. (a)) (counts 4 and 5) and one count of

[1] Further statutory references are to the Penal Code unless otherwise indicated.

continuous sexual abuse of a child (§ 288.5, subd. (a)) (count 6). All the offenses were alleged to have occurred on or between September 16, 2013, and February 29, 2016.

The victim, Dominick, was five to seven years old during the charged time frame. Starting when he was five, Dominick and his sister M., 13 months older, were often dropped off to spend weekends at the home of their grandmother and great-grandmother. Appellant, a family friend who would take great-grandmother to appointments and to do errands, was frequently at the house. Appellant often played with Dominick and M. in the "computer room." Dominick had eczema and was teased by other children, who would say they could not play with him because they might catch it. According to the children's mother, Dominick called appellant his "best friend." Dominick's father was not involved in his life at that time, and mother appreciated appellant being there for him.

One evening in February 2016, when Dominick was at grandmother's house and M. was at home with mother and mother's boyfriend, M. said she wanted to talk to mother privately. Crying and hesitating because, she said, she did not want to get Dominick in trouble, M. eventually told mother that she had walked into the computer room at great-grandmother's house and saw Dominick with his mouth on appellant's penis. M. said she could not remember exactly when this occurred but that Dominick was in kindergarten. In February of 2016, Dominick was in first grade.

Mother called Dominick and asked him to meet her outside great-grandmother's house, then drove the short distance to the house. Sitting on a stone bench in the yard with Dominick, mother told him she had a question, he needed to tell her the truth and he would not get in trouble. She asked if anyone had ever touched him "down there," pointing to his genitals, and Dominick said no. He looked uneasy. Mother asked if anyone had ever "had him touch them down there," and Dominick again said no, but stood up to walk away. Mother told him to come back, he came "halfway" and she asked if anyone had ever "asked him or had him put his mouth on their private area." Dominick started to cry and ran toward the house, then stopped at the door. As he cried, mother told him that "he was okay, that he wasn't in trouble and to just tell [her] the truth." Dominick yelled that appellant did it, then ran and locked himself in the computer room.

When he unlocked it and mother went in, Dominick was still crying a lot and said, "I hate you, [M.] Why did you tell?" He continued to say he did not want appellant to get in trouble because appellant was his friend.

The next evening mother asked Dominick whether it had happened more than once. He said it did, but he did not know how many times, and that it happened in the computer room when they were playing computer games. He asked mother not to tell anyone about it and on the morning she was going to make a police report, he asked her not to because appellant was his best friend and he did not want to get appellant in trouble. Mother made an appointment for him to see a psychiatrist; at the time of trial he was seeing two. Mother testified that the children's relationship with each other changed after M. told mother about appellant: They had previously fought with each other, to the point that mother had started sending them to her mother's house separately, but it got worse, Dominick "constantly" fighting with M., hitting her "a lot" and saying he did not like her.

M. testified that one day when she wanted Dominick to come outside with her to play with a friend, he was in the computer room with the door closed. She opened the door and saw appellant on the chair, leaning back, with his hands on the armrests and his pants "down halfway." Dominick was on his knees in front of appellant, "sucking his pee pee," his mouth moving up and down. M. could see "a little bit" of appellant's "pee pee" outside his pants, and she saw "the ball part" "hanging down." M. was scared and quickly closed the door. Both grandmother and great-grandmother were home but M. did not say anything because she was scared of "getting blamed for it." She did not remember what grade she or Dominick were in on that day, or what school they were attending, but testified that it was "a couple of years" later that she told mother what she had seen. She told mother because she was "tired of . . . keeping it to myself" and a friend told her about the same thing happening to the friend's brother. She never talked to appellant or Dominick about it, and Dominick was mad at her for telling mother because he did not want anyone to know. M. was not friends with appellant anymore.

Dominick testified that sometimes when he was in the computer room with appellant, appellant would tell him to "[s]uck his pee pee." This made Dominick feel "disgust" and he did not want to do it, but he did anyway. Dominick testified that he did not remember how old he was when it first happened, whether he lived in Vallejo or American Canyon, or which school he was going to. It happened more than one time but he did not remember how many; it was not every time he was at great-grandmother's house. The last time it happened was "probably a week" before the day mother talked to him about this, but he was not sure. Asked if he remembered whether it happened more than two times, Dominick said no; asked if he remembered if it was more than five times, he said yes; asked if it was more than 10 times, he said he "forgot." Asked if he remembered whether appellant's "pee pee" was "soft and kind of hanging down" or "hard and sticking up," Dominick said it was "soft and hanging down." Appellant would be sitting in the chair he normally sat in, and Dominick would be "[s]ometimes in the chair, sometimes on the floor," on his knees between appellant's legs. Appellant did not ask Dominick to touch him anywhere else and did not touch Dominick. Asked if there were any times his "pee pee" touched appellant's "butt," Dominick said he did not remember. Dominick did not tell anyone what appellant was making him do because he was scared he was going to get in trouble. Asked if he was mad at M. for telling mother, he first said no, then said "[a] little, though."

Detective Nathalie Hurtado interviewed each of the children on March 9, 2016, and interviewed appellant on March 10. All the interviews were recorded and videos were played for the jury at trial.

Hurtado testified that M. was outgoing, talkative and friendly during her interview, and gave an account consistent with her testimony at trial. M. said it had been a couple of years since the incident she witnessed. When first asked if she remembered what grade she was in at the time of the incident, M. said kindergarten, first or second but said she did not really know. Later in the interview, she said she thought Dominick was "4 or 5" at the time and, when asked if her memory was any better as to what grade she was in, said she thought she was in first grade.

Hurtado testified that Dominick, whom she described as being "very outgoing and precocious and talkative" in court, was "nothing like that at all" at the interview, crying or "shut[ting] down" whenever she tried to broach the subject of why he was there. Eventually they had mother come in, and while Dominick still had difficulty articulating answers, he said he knew he was there about appellant. With use of a diagram, Dominick indicated that appellant had made him suck appellant's penis. Dominick said it happened "[a] lot," meaning "a big number," possibly 30 times. Asked if there were other parts of appellant's body that touched him, Dominick indicated appellant's butt touching Dominick's penis. Dominick said the first time something happened was when he was living at his grandfather's house and attending elementary school, and the last time was the day that his mother came to talk to him about what was going on.

Appellant told Hurtado at the outset of his interview that the abuse allegations were "all fabricated," M. was "an evil little girl" and she and Dominick "must have planned this for a while." Appellant said that when M. was about five years old, she would get on his lap and play on the computer, and one day said, "I wanna have sex with you." Every time he would go to the house, she "wanted to have sex," so he told her grandmother, who said she would speak with M. The next time he saw her, M. told him, "you snitched on me . . . You told 'em I wanted to have sex with you . . . . Well, you'll be sorry." After that, she "always snubbed" him. Appellant told Hurtado, "I have no interest in sex. It won't even get up." Asked why an eight-year-old girl would have waited two and a half years to get back at him, appellant suggested it could have been because he had recently yelled at M. for spilling a soda in his car. Appellant told Hurtado, apparently referring to the adults in the family, "[t]hey're meth heads. All of 'em. . . . Every one of 'em." He said the children were breathing the smoke and "that's one of—what's wrong with him." He referred to Dominick having scabs all over his body and said he felt sorry for him and "tried to be like a father" because Dominick's father had nothing to do with him. Appellant said that one day when Dominick was four or five, he told appellant, "I had a dream last night my dick was so big I could suck it."

Grandmother testified that appellant never asked her to talk with M. about her wanting to have sex with him and she never had such a talk with M. Grandmother said M. was a "tattletale," and that she would not classify either of the children as dishonest.

Stephanie Doe, who was 33 years old at the time of trial, testified that appellant had molested her when she was a child. Appellant is Stephanie's father's half brother. Stephanie did not know Dominick and his family and travelled from her home in New York to appear at the trial.

Stephanie testified that one night when she was four years old, while appellant was staying at her family's home, he had her lie on the couch with him, pulled his penis out, had her touch it with her hand, and stroked her vagina under her clothing. She did not tell anyone. When she was about eight years old, her parents were divorcing and her father was staying with appellant at the funeral home where he lived and worked as a mortician. On one occasion when Stephanie was visiting, appellant showed her naked pictures in a magazine, licked the pages and wanted her to do so as well, and exposed his penis to have her touch it. Around the same time, there were two encounters at the home of appellant's wife's parents, who were neighbors of Stephanie's family. In the first, Stephanie went over to visit and found appellant laying on the couch; he pulled his penis out, his wife's family came home and Stephanie ran out the back door. The other was in an RV at the neighbors' house: when appellant's in-laws left, appellant tried to grab Stephanie and she told him this "wasn't right." Another time at the funeral home, appellant came up behind her, rubbing her "privates" and grinding his body against her. After this incident, Stephanie called her mother and told her what appellant had been doing. Her mother yelled at appellant and told him to stay away from her, but did not call the police. Stephanie did not see him again until she was 14, when she unexpectedly saw him at her grandmother's house. She yelled at appellant and told her cousin and grandmother what had happened, but her grandmother "tried to put it under the rug." That was the last time she saw appellant. Stephanie found out about the present case when her brother, a police officer in Pennsylvania, called to tell her there had been another encounter with a child. She called Hurtado because nothing had been done when

she was a child and she had been strongly affected by what appellant did; she felt it was important to testify in the case because "[h]e can't be around children."

Defense

Appellant denied the alleged conduct with Dominick. He testified that due to a health condition, "it won't get up. It hasn't been for a long time. No sexual desire whatsoever." He testified that great-grandmother and grandmother smoked methamphetamine in the computer room, and acknowledged that he also smoked methamphetamine at the house when the children were there and great-grandmother sometimes paid him with methamphetamine for the time he spent doing errands and driving her places. About a month before the accusations against him were made, appellant had told great-grandmother that the children were being exposed to methamphetamine smoke and would be taken away if Child Protective Services found out.

Appellant believed that M. made up the story about him making Dominick put his mouth on appellant's penis and the children "got together on this." He testified that M., at age six, dressed in skimpy clothing when she was around him, asked him to help her get things out of the dryer when she was naked, flirted with him, repeatedly said she wanted to have sex with him and bounced on his chest saying "this is sex." After he told great-grandmother that someone needed to talk to M. and great-grandmother told him she and grandmother had done so, M. got upset with appellant for "snitching" on her. Asked, "[s]o she waited two, two and a half years until she was about eight years old to wage that vendetta against you?" appellant replied, "I guess. That's the only reason I can explain it."

Appellant denied ever touching Stephanie in a sexual way. He testified that twice while he was sleeping on the sofa at his brother's home when Stephanie was about four, he woke up to find her "examining" his penis. He moved out of the house because of this, without discussing what happened with his brother. According to appellant, Stephanie had only been at the mortuary once, with her father present, and there was no

RV at his in-laws' house. He thought Stephanie was upset with him because she blamed him for her parents' divorce and made up stories about him because she held a grudge.

The jury found appellant guilty as charged. At sentencing, the trial court dismissed the count of continuing sexual abuse and sentenced appellant on the remaining counts to a prison term of 36 years to life, consisting of consecutive terms of 15 years to life on counts 1 and 2, a six-year middle term on count 4, and concurrent terms on counts 3 and 5.

DISCUSSION

I.

Section 288.5 provides that any person who "resides in the same home with" or "has recurring access to" a child under the age of 14 years and engages in three or more acts of "substantial sexual conduct" or "lewd or lascivious conduct" over a period of at least three months is guilty of the offense of continuous sexual abuse of a child. Under subdivision (c) of section 288.5, "[n]o other act of substantial sexual conduct . . . or lewd and lascivious acts . . . involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative." Interpreting section 288.5, subdivision (c), *People v. Johnson* (2002) 28 Cal.4th 240, 244 (*Johnson*), held that a defendant may not be convicted of both a violation of section 288.5 and individual sexual offenses that occurred during the same time period. The defendant in *Johnson* had been convicted of both, and the Supreme Court upheld the lower courts' decision to remedy the situation by affirming the conviction of continuous sexual abuse and reversing the convictions on the individual sexual offenses. (*Johnson,* at p. 244.)

Here, the information did not charge counts 1, 2 and 3 as alternatives to count 6, but in discussions over jury instructions, the prosecutor pointed out that if the jury were to find appellant guilty of all these offenses, count 6 would have to be dismissed. Defense counsel did not request an instruction that count 6 was an alternative to counts 1,

2 and 3, and no such instruction was given.[2] After the jury found appellant guilty of all the charges, at sentencing, defense counsel agreed that the court should dismiss count 6 and, as indicated above, the court did so. Appellant contends that due to the prosecutor's failure to charge the offenses in the alternative, and the trial court's failure to instruct that the charges were in the alternative, the trial court was required to dismiss the individual counts and leave him convicted of only continuous child abuse. The maximum penalty for continuous child abuse, 16 years, is significantly lower than the 36 years-to-life sentence appellant received.[3]

As others have pointed out, *Johnson* did not hold that the remedy for violation of section 288.5, subdivision (c), must always be dismissal of the individual count; it held only that " '*either* the continuous abuse conviction *or* the convictions on the specific offenses must be vacated.' " (*People v. Torres* (2002) 102 Cal.App.4th 1053, 1057 (*Torres*), quoting *Johnson, supra,* 28 Cal.4th at p. 245.) *Torres* held that it is "appropriate, in deciding which convictions to vacate as the remedy for a violation of the proscription against multiple convictions set forth in section 288.5, subdivision (c), [to] leave appellant standing convicted of the alternative offenses that are most commensurate with his culpability." (*Torres,* at p. 1057; *People v. Bautista* (2005) 129 Cal.App.4th 1431, 1437.) This conclusion was based on the facts that "[t]he intent of the Legislature in enacting section 288.5 was 'to provide *additional* protection for children subjected to continuing sexual abuse and certain punishment[]' (Stats. 1989, ch. 1402, § 1, p. 6138, italics added[])," and "section 288.5, subdivision (c) gives the prosecutor maximum flexibility to allege and prove *not only* a continuous sexual abuse count, but also specific

[2] After discussion about whether to instruct that the offenses charged in counts 1, 2 and 3, and their lesser included offenses, were lesser included offenses of count 6, defense counsel declined to request such an instruction.

[3] Respondent argues that appellant's claim was forfeited by his failure to demur to the information and/or should be denied as invited error due to defense counsel's failure to request a jury instruction and express agreement at sentencing that dismissal of count 6 was appropriate. We do not address these issues. As appellant maintains trial counsel rendered ineffective assistance of counsel in this regard, we find it more straightforward to simply address the merits of the claim.

felony offenses commensurate with the defendant's culpability, subject only to the limitation that the defendant may not be *convicted* of both continuous sexual abuse and specific felony sex offenses committed in the same period." (*Torres*, at p. 1059.)

In *Torres*, the court found it more appropriate to reverse the conviction for continuous sexual abuse because the defendant "was alleged to have committed, and the prosecution proved, not only the three acts necessary to establish a continuous sexual abuse violation, but also 10 separate felony sex offenses against [the victim] including four counts of rape. Because of the number and severity of these specific offenses, [the defendant] faced a greater maximum aggregate penalty with respect to these than he did on the continuous sexual abuse offense." (*Torres*, *supra*, 102 Cal.App.4th at pp. 1059-1060, fn. omitted.) By contrast, in *Bautista*, *supra*, 129 Cal.App.4th 1431, where the individual convictions were for procuring a child for lewd acts, this court affirmed the conviction of continuous sexual abuse and vacated the individual convictions. (*Id*. at p. 1438.) We noted, "Bautista has not suggested how a conviction of four counts of procuring C. is in any way more commensurate with her culpability than a conviction of continuous sexual abuse of C., and we fail to see how convicting Bautista only of procurement is in any way proportionate to the egregious criminal conduct in which she engaged." (*Ibid.*)

Appellant acknowledges that *Johnson* approved the "solution" employed by the court in the present case, but argues that *Johnson* failed to consider the "severe prejudice to a defendant" from the remedy, which in appellant's view "violates fundamental fairness." According to appellant, a defendant has a "fundamental constitutional right" to have the *jury* "make the alternative decision to convict the defendant of the section 288.5 charge or the specific charges."

The cases appellant relies upon are inapposite. *People v. Scofield* (1928) 203 Cal. 703, 709, was concerned with a verdict finding the defendant guilty of an offense that could be committed by a number of alternative acts, each requiring independent proof, where the trial court failed to instruct the jurors that they had to agree upon at least one of the alternatives. The present case does not involve any issue of potential lack of

agreement among jurors as to the nature of the act underlying each count. *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, and *United States v. Booker* (2005) 543 U.S. 220, 231, stand for the principle that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" (*Apprendi*, at p. 490), " 'no matter how the state labels it.' " (*Booker,* at p. 231, quoting *Ring v. Arizona* (2002) 536 U.S. 584, 602.) This principle is not violated in the present context: The facts underlying each conviction *were* found by jury beyond a reasonable doubt. Appellant is simply wrong in stating that the *Johnson* holding violates his constitutional right to a jury trial "by permitting the trial court—or here, the prosecutor—to, in effect, decide whether he should serve 36 years-to-life for the specific convictions or, at most, 16 years for the section 288.5 conviction." "[I]n cases not involving the death penalty, it is settled that punishment should not enter into the jury's deliberations." (*People v. Engelman* (2002) 28 Cal.4th 436, 442.)

The trial court properly addressed the error under section 288.5, subdivision (c), by vacating the conviction on the count of continuous sexual abuse.

II.

Appellant contends the trial court abused its discretion in admitting Stephanie Stephanie's testimony over his objections that the evidence was irrelevant, remote and more prejudicial than probative. He maintains that it was propensity evidence so prejudicial as to render the trial fundamentally unfair.

As appellant recognizes, evidence of prior sexual offenses is admissible pursuant to Evidence Code section 1108, subdivision (a), which provides that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

In exercising discretion under Evidence Code section 352 as to a sexual offense, " 'trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing,

misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.' " (*People v. Loy* (2011) 52 Cal.4th 46, 61, quoting *People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

Stephanie's testimony was clearly relevant and probative. Evidence Code section 1108 was enacted to "expand the admissibility of disposition or propensity evidence in sex offense cases." (*People v. Falsetta, supra,* 21 Cal.4th at p. 911.) " '[T]he Legislature's principal justification for adopting [Evidence Code] section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes.' " (*People v. Avila* (2014) 59 Cal.4th 496, 515, quoting *Falsetta,* at p. 915.) Here, where the only witnesses to the charged offenses were young children whom appellant maintained had fabricated the allegations against him, Stephanie's testimony was highly probative on the issue of appellant's propensity to molest young children. (*People v. Waples* (2000) 79 Cal.App.4th 1389, 1395.) The testimony was neither overly time consuming nor more inflammatory than the evidence of the charged offenses.

Appellant's attempt to downplay the similarity between the alleged conduct and the conduct Stephanie described is not convincing. Appellant points out that Dominick is a boy and Stephanie was a girl, that Stephanie did not describe oral copulation or penis-to-butt touching and that Dominick did not suggest appellant showed him pictures of nudity. Nevertheless, as the trial court recognized, the prior and current offenses both involved children in a similar age range, whom appellant had touch his penis, and in both cases appellant was able to engage in the alleged conduct by taking advantage of a

relationship that gave him unmonitored access to the child. As the trial court also recognized, the primary factor weighing against admission of the evidence of prior sexual offenses was its remoteness. The remoteness of the evidence, however, does not require exclusion where other factors militate in favor of admission. (*People v. Robertson* (2012) 208 Cal.App.4th 965, 970; *People v. Branch* (2001) 91 Cal.App.4th 274, 285.)

For purposes of Evidence Code section 352, " 'prejudice' does not mean damage to a party's case that flows from relevant, probative evidence. Rather, it means the tendency of evidence to evoke an emotional bias against a party because of extraneous factors unrelated to the issues." (*People v. Cortez* (2016) 63 Cal.4th 101, 128.) The trial court's decision to admit the evidence of prior sexual offenses was certainly not " 'arbitrary, whimsical, or capricious as a matter of law' " so as to constitute an abuse of discretion under Evidence Code section 352. (*People v. Branch, supra,* 91 Cal.App.4th at p. 282, quoting *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1614.)

III.

Appellant's contention that the evidence was insufficient to support the verdict on count 1 is also unavailing. As appellant points out, the prosecutor told the jury in closing argument that count 1 was "the first time it happened," count 2 was "the time that M. walked in and saw that happening" and count 3 was "the last time it happened." Appellant argues there was no evidence that the time M. walked in was not the first incident of molestation or that the conduct alleged as count 1 occurred within the charged time period, as Dominick neither stated that any sexual conduct occurred prior to the incident M. witnessed nor specified where or when the first incident occurred.

Appellant is wrong on the second point. Dominick told Hurtado in his interview that the first incident occurred while he was living with his grandfather and attending elementary school in Vallejo. Mother's testimony established that this had to be prior to

October 2015, when she and the children moved to American Canyon and the children started to attend school there,[4] and therefore was well within the charged time frame.[5]

Assuming for purposes of discussion that the evidence did not establish that the incident M. walked in on was not the first time appellant had Dominick orally copulate him, appellant is incorrect in assuming this fatally undermines his conviction on count 1. Appellant treats the prosecutor's description of the act upon which each count was based—the first incident, the incident M. saw, and the last incident—as an election that required the prosecution to prove beyond a reasonable doubt three incidents that occurred in the order stated. It was not.

As explained in *People v. Jones* (1990) 51 Cal.3d 294, 314, 316, generic testimony from a child victim of sexual abuse is sufficient if it describes "*the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy)"; the "*number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping')"; and "*the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period." (*Id.* at p. 316.) In a case in which "there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them," the constitutional requirement of juror unanimity is satisfied if the jury "unanimously agrees the defendant committed all the acts described by the victim." (*Id.* at p. 322.)

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[4] Prior to October 2015, mother and the children had lived with mother's father in Vallejo, where the children attended elementary school; between June and August 2015, they had stayed with great-grandmother in American Canyon.

[5] As appellant acknowledges, Dominick also specified the timing of the final incident—stating in his interview that it was the day his mother came to talk to him and in his trial testimony that it was about a week prior to that discussion.

Accordingly, appellant's jury was instructed that the prosecution had presented evidence of more than one act to prove appellant committed the offenses charged in counts 1, 2 and 3, and that in order to find him guilty, the jurors had to *either* "all agree that the People have proved that the defendant committed at least one of these acts and . . . all agree on which act he committed for each offense" or "all agree that the People have proved that the defendant committed all the acts alleged that occurred during this time period and have proved that the defendant committed *at least the number of offenses charged*." (Italics added.) The prosecutor, in closing argument, suggested that the jurors focus on the second of these options: "[I]f you think Dominick orally copulated him at least three times in the time period charged, find him guilty. You don't all need to agree that this first one happened on this date, the time that M. saw them, and the last one happened on a specific date; just that it happened at least three times in that time period."

Thus, the premise of appellant's argument—that the prosecutor's argument bound her to prove that the incident upon which count 1 was based occurred prior to the incident M. walked in on—is faulty. The prosecutor, consistent with the jury instructions, told the jury it only had to find she had proved beyond a reasonable doubt that appellant committed at least the number of offenses charged within the charged time period. As the prosecutor told the jury, "[t]his is a case where it either happened or [it] didn't. Either Dominick is telling the truth and you believe him or it didn't happen." The evidence amply supported the three instances of oral copulation with which appellant was charged, as it showed there were at least three incidents between September 16, 2013 (Dominick's fifth birthday), and February 29, 2016 (when the offenses came to light). Since the children did not begin spending weekends at great-grandmother's house without mother until Dominick was five, the abuse necessarily occurred after September 16, 2013; it ended on or a week before the day M. revealed the abuse and mother discussed it with Dominick, and Dominick testified it happened "a lot"—as many as 30 times—in total.

DISPOSITION

The judgment is affirmed.

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Kline, P.J.

We concur:

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Richman, J.

_____
Stewart, J.

People v. Mallette (A155263)